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## Achieving freedom from discrimination for LGBTI people

Submission to the inquiry of the Senate Legal & Constitutional Affairs Committee  
into the Exposure Draft of the *Human Rights & Anti-Discrimination Bill (2012)*

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Equality and social justice for the LGBTIQ community

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## About the Victorian Gay & Lesbian Rights Lobby

The Victorian Gay & Lesbian Rights Lobby is an independent, non-profit, non-government organisation which works to end discrimination and achieve equality and social justice for lesbian, gay, bisexual, transgender and intersex people.

We are a membership based organisation and work with and for the community, along with non-profit, justice, health and government agencies, to create positive change in the area of human rights and policy development.

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# 1. Introduction

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## Background

- 1.1 The Victorian Gay & Lesbian Rights Lobby (**VGLRL**) welcomes the opportunity to provide a submission on the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) (**Bill**) to the Senate Standing Committee on Legal and Constitutional Affairs (the **Committee**).
- 1.2 This proposed reform represents the culmination of years of advocacy around the need to provide legal protections for Lesbian, Gay, Bisexual, Transgender and Intersex (**LGBTI**) people to protect them from discrimination at the national level, which will provide national consistency to the disparate approach currently provided by differing state and territory laws. The proposed extension of protections for LGBTI people also coincides with an effort to strengthen and modernise federal anti-discrimination law. The VGLRL welcomes the significant work undertaken by the Federal Government to harmonise, simplify and enhance federal anti-discrimination law in keeping with Australia's international human rights obligations.
- 1.3 The VGLRL has previously made submissions advocating for protections against discrimination for LGBTI people at a national level. In recent times, the VGLRL has played a national role co-ordinating lobbying and advocacy on behalf of the LGBTI human rights organisations and individuals in relation to this Bill. This collaborative work followed a national roundtable convened in October 2012 to develop a broad consensus positions on key issues for the LGBTI communities arising from the current reforms.<sup>1</sup>

## Scope of this submission

- 1.4 This submission is not intended to be a comprehensive response to the Bill. Rather, the submission is particularly focussed on key LGBTI issues raised by the Bill as currently drafted, based on our expertise and the community feedback we received in the time available. The submission also comments on a number of aspects of the general legal framework given the importance of these provisions to all groups protected under the Bill.
- 1.5 The VGLRL recognises the importance of respecting and encouraging the autonomous voices of bisexual, transgender and intersex people and their respective representative

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<sup>1</sup> National Roundtable convened by NSW Gay & Lesbian Rights Lobby and the Australian Centre for Human Rights (UNSW) on 26 October 2012.

organisations.<sup>2</sup> Given this, the primary representative mandate of the VGLRL relates to lesbians and gay men. However, the VGLRL submission addresses issues relating to all LGBTI communities, as we believe it is important to support bisexual, transgender and intersex organisations and individuals including members of the VGLRL who identify as bisexual, transgender and/or intersex. There also exist some parallels and overlap between aspects of the Bill that relate to the various population groups.

- 1.6 We encourage the Committee to give primacy to the input of organisations representing sex and gender diverse individuals on issues relating to intersex, gender identity and gender expression and any other matters affecting transgender and intersex Australians.

## Language and terminology

- 1.7 In this submission we employ the terms lesbian, gay, bisexual, transgender, and intersex (LGBTI) to describe commonly accepted and identified sexual and gender minorities. We recognise that these terms alone do not capture the variety and multiplicity of variations in sex and/or gender related orientation, behaviours, identity and/or status within the Australian community. For example, the Committee should note that terms such as queer, gender queer, androgynous, transsexual, asexual and pansexual are used by individuals to describe their sexual orientation, sex and/or gender identities.
- 1.8 As will be discussed below, same sex attracted or gender questioning individuals or those engaged in same sex sexual activity may not explicitly identify as lesbian, gay, bisexual, transgender or intersex but this should be no barrier to protection from discrimination.

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<sup>2</sup> The history of the VGLRL and its name reflect this recognition.

## 2. Key recommendations

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The VGLRL recommends that Bill be passed in the current parliamentary term, with the following key amendments considered by the Committee in their report.

### Recommendation 1:

The VGLRL recommends that the protected attribute 'sexual orientation' be retained, preferably with the following minor modifications to provide further clarity:

- a. specify that sexual orientation includes behaviour and identity as well as feeling or attraction;
- b. insert a reference to 'emotional, affectional or sexual' orientation; and
- c. replace references to 'opposite sex' with 'different sex'.

### Recommendation 2:

The VGLRL recommends that the protected attribute 'relationship status', which is inclusive of same-sex defactocouples be retained.

### Recommendation 3:

The VGLRL recommends that the term 'family responsibilities' be changed to 'family and caring responsibilities' and defined to include all LGBTI domestic relationships and cultural understandings of family, including kinship groups, and members of the carer's household.

### Recommendation 4:

The VGLRL recommends that the Bill:

- d. adopt the definition of 'gender identity' in the Tasmanian Bill, that does not rely upon a 'genuine basis' test and is broadly inclusive of 'gender expression' .
- e. Include 'gender identity' under the circumstances involving sexual harassment listed at s 49(2)(a).

### Recommendation 5:

The VGLRL recommends that the Bill include 'intersex' as a separate protected attribute, using the definition from the Tasmanian Bill.

### Recommendation 6:

The VGLRL recommends the inclusion of 'irrelevant criminal record' as a protected attribute. In particular, the VGLRL recommends ensuring that LGBTI Australians formerly charged with laws prohibiting homosexual acts that would otherwise be lawful under current law are protected from discrimination. This could be achieved by the inclusion of the 'irrelevant criminal record' attribute' or potentially the attribute of 'lawful sexual activity'.

### Recommendation 7:

The VGLRL recommends that ‘status as a victim of domestic violence’ should be a protected attribute, which would offer protection to LGBTI people experiencing family violence.

#### **Recommendation 8:**

The VGLRL recommends that the extended meaning of having a protected attribute in s 19(4) and definition of protected attribute in s 17(2) be maintained.

#### **Recommendation 9:**

The VGLRL recommends the scope of protections for all protected attributes in the Bill be extended to all areas of public life and the limitation for claims of intersectional discrimination in s22(3) be removed.

#### **Recommendation 10:**

That the committee investigate thoroughly the necessity for religious exemptions and include in its report a more detailed explanation of the need for religious exemptions, including specific examples from religious providers of how and where such exemptions are required.

#### **Recommendation 11:**

The VGLRL supports the limitation on exceptions and exemptions for aged care providers including religious organisation. We respectfully recommend the committee specifically state support for these provisions contained within s 33(3) and amend the Bill in the following manner to ensure consistent application across the Bill:

- a. that the provision currently found within s 33(3) be applied across the entirety of ‘Division 4’ to cover all exemptions/exceptions; in particular:
  - i. s 43 (domestic duties);
  - ii. s 34 (club or member based associations) and
  - iii. s 30 (regulations)
- b. that the definition of ‘Commonwealth-Funded Aged Care’ be updated to specifically include reference to the Commonwealth HACC / Home Support program.

#### **Recommendation 12:**

The VGLRL recommends that the religious exceptions be removed in favour of reliance on the defence of justification.

In the alternative, we recommend that:

- a. all religious organisations in receipt of government funding be restricted from discriminating in the delivery of goods and services;
- b. all religious organisations in receipt of government funding, including those operating in the aged care sector, be prevented from discriminating against employees;
- c. religious organisations intending to rely on the exceptions be required to publish a notice on their websites and in literature provided to potential applicants/customers/patients/students or others potentially affected by their intended discrimination and register a notice with the Commission; and/or

- d. sub-sections 33(2)(b)(ii) and 33(4)(c)(ii) (*injury to religious sensitivities*) be removed or clearly defined.

### **Recommendation 13**

The VGLRL recommends that the exception for attribute based clubs in the Bill be retained but the definition of ‘volunteer associations’ from the model *Work Health and Safety Act* should be applied to remove such organisations from the operation of the Bill.

### **Recommendation 14:**

The VGLRL recommends that s 39(3) be amended to clarify that individuals in de facto relationships cannot be treated less favourably than married individuals.

### **Recommendation 15**

We recommend that s 30 (exception for regulations) be amended and that Government be required to rely on s 26 (laws or disallowable instruments exception) or apply for temporary exemptions from the Act.

### **Recommendation 16:**

The VGLRL recommends that the special measures provisions be amended as follows:

- a. the test of ‘sole or dominant purpose’ in s 21(2)(a) should be broadened in relation to ‘sexual orientation and gender identity attributes, consistent with the SDA, to ensure a more enabling approach to the adoption of special measures; and
- b. a requirement for participation by, or consultation with, affected groups should be included.

### **Recommendation 17:**

The VGLRL recommends that the Bill be amended to include positive duties on public and private sector actors to promote equality and/or eliminate discrimination.

### **Recommendation 18:**

The VGLRL recommend that the Committee ensure ongoing representation of Sexual Orientation and Gender Identity (SOGI) issues by the Commission by either:

- a. appointing a Commissioner responsible for Sexual Orientation and Gender Identity (SOGI) discrimination and providing for such a role in s 160 of the Bill; or
- b. specifically state in legislation that SOGI issues will be the responsibility of the President or delegated to an alternative Commissioner.



**Recommendation 19:**

The VGLRL recommends that the unified definition of discrimination, shared burden of proof and no costs jurisdiction be retained.

**Recommendation 20:**

The VGLRL recommends that s19(2)(b) be amended in line with recommendation 3 of the Human Rights Law Centre submission.

**Recommendation 21:**

The VGLRL recommends that s 133 be amended to require the Court to take into account factors such as the tax subsidies available to the respondent, the financial means of the parties, any other vulnerabilities of the parties and the public interest in the case.

**Recommendation 22:**

The VGLRL recommends that the Bill be amended to make provision for representative complaints by the Commission and public interest organisations with a legitimate interest in a particular subject matter.

**Recommendation 23:**

The VGLRL recommends that the protection for volunteers contained in the Bill be retained.

### 3. The case for reform

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- 3.1 Unfortunately, the vast majority of LGBTI people experience discrimination, harassment and violence on a daily basis.<sup>3</sup> This has very real day-to-day effects on their lives and livelihoods and can lead to feelings of alienation, disconnectedness, isolation and depression. Medical experts recognise the negative health impacts of discrimination on LGBTI wellbeing.<sup>4</sup> The mental health of LGBT people remains remarkably poorer than that of the general population.<sup>5</sup> Reducing discrimination and its social and economic costs should be a key priority for government.

#### The impact of discrimination in employment

- 3.2 Institutional discrimination against LGBTI people is a significant problem in workplaces:

*'Homophobic bullying takes place at all levels of an organisation. Among those who have experienced bullying, a quarter have been bullied by their manager, half by people in their own team and nearly a third by people junior to them'.<sup>6</sup>*

- 3.3 This was the experience of LGBTI staff in a large Sydney public hospital:

*'In the case of administrative harassment, the person inflicting the discrimination exploits institutional policies and procedures...the rules can be used by the person discriminating as a strategic weapon to hide behind and to give a veneer of legitimacy to discriminatory actions. This form of harassment depends on applying the "rule book" in rigid ways and "to the letter," to the point of harassment'.<sup>7</sup>*

*'I've seen staff have a horrendous time...I have known of one nurse being called the "bush dyke lesbian bitch from hell" to her face...(by) other staff. And her being totally demoralised in the workplace because of her external appearance of being very butch. She was labelled and really discriminated against, regardless of how hard she worked or how nice she was, or*

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<sup>3</sup> Nearly 85 per cent of LGBTI respondents have been subject to heterosexist violence or harassment in their lifetimes: Leonard, W., Mitchell, A., Patel, S., and Fox, C., (2008) *Coming Forward: The Underreporting of Heterosexist Violence and Same Sex Partner Abuse in Victoria*, Australian Research Centre for Sex Health and Society: Melbourne.

<sup>4</sup> Australian Medical Association (Online) Position Statement on Diversity and Gender (available at: <http://www.ama.com.au/web.nsf/doc/WEEN-5GA2YX>).

<sup>5</sup> Leonard et al, *Private Lives 2: The second national survey of the health and wellbeing of GLBT Australians*, Australian Research Centre in Sex, Health & Society, La Trobe University, 2012, p vii.

<sup>6</sup> Hunt, R., and Dick, S., (2008) *Serves You Right: Lesbian and Gay People's Expectations of Discrimination*, Stonewall: UK, p 18.

<sup>7</sup> Bowers R., Plummer D., McCann P., McConaghy C., Irwin L., (2006) *How we Manage Sexual and Gender Diversity in the Public Health System: A Research Report*, School of Health, University of New England and Northern Sydney Central Coast Health: NSW, p 22.

whatever she did, she worked on a ward where it was not accepted and not tolerated, and the aim was to piss her off out of there as quick as they could'.<sup>8</sup>

- 3.4 Researchers found that this entrenched discrimination, based on sexual orientation, gave rise to pronounced costs in the form of increasing staff turnover due to career dissatisfaction; litigation; a decline in reputation of the service, leading to decreasing consumer utilisation; and 'system complicity with climates of bullying and harassment'.<sup>9</sup> The economic and social cost of homophobic discrimination and harassment is clear.

#### Discrimination against LGBTI young people

- 3.5 In a 2010 national study about the sexuality, health and wellbeing of same sex attracted and gender questioning young people, it was found that over 60 per cent had experienced some form of physical or verbal abuse.<sup>10</sup> 18 per cent of young people reported being physically assaulted because of their sexuality.<sup>11</sup> These assaults were more likely to be perpetrated against young men (23 per cent) and particularly Gender Queer young people (31 per cent).<sup>12</sup> Alarming, school was the most likely place of abuse with 80 per cent of abuse occurring within the school grounds.<sup>13</sup>
- 3.6 Homophobia can cause students to underperform and withdraw from the many informal school curricula. Homophobic bullying can lead to mental health problems, including depression and in some circumstances suicide.<sup>14</sup>

#### **Stories from LGBTI young people: Talon (20 years)**

'I have been beat up numerous times since coming out at 14/15 at school. I was beat up by three men at a local pub because I wouldn't talk to them about my sexual encounters, or go home with them. I also got beat and kicked out by my dad when he found out I was gay.

(Hillier et al, 2008, p 42)

<sup>8</sup> Above, n 7, p 22.

<sup>9</sup> Above, n 7, p 13.

<sup>10</sup> Hillier, L., T. Jones, M. Monagle, N. Overton, L. Gahan, J. Blackman and A. Mitchell, *Writing Themselves In 3: The third national study on the sexual health & well-being of same-sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health & Society, (ARCSHS), La Trobe University, 2010, p ix.

<sup>11</sup> Above, n 10, p 41.

<sup>12</sup> Above, n 10, p 41.

<sup>13</sup> Above, n 10, p ix.

<sup>14</sup> Above, n 10, p 31.

Discrimination in health and aged care settings

- 3.7 Institutionalised homophobia and discrimination also presents difficulties for LGBTI people when accessing in health services including aged care services. According to a 2002 Victorian study, there remains considerable discrimination in this field. Over 89% of same-sex attracted people experienced judgmental or phobic attitudes from health care professionals.<sup>15</sup>
- 3.8 The experience of sex and gender diverse people could be characterised is very poor. Many individuals report inappropriate care due to a lack of sensitivity or understanding from providers about the nature of their social, anatomical and/or biological differences.<sup>16</sup>

Social exclusion and isolation for LGBTI people in rural and remote areas

- 3.9 Quinn's (2003) research on rural suicide found that, while minority sexuality is not, in itself, a reason for suicide, it might be a contributing factor. A number of studies have found that restricted access to services in rural areas and, hence, unmet needs of lesbians, lead to social exclusion and a lack of 'belonging'.<sup>17</sup>
- 3.10 Older rural lesbians whose partners die can often face exclusion because they are invisible:
- 'In rural Victoria a lot of lesbians are not out. Some of them have been living together for many years but haven't come out to work or to their family. So, when their partner dies they are devastated because they can't tell anyone'*
- (Vanessa: manager, community care).*<sup>18</sup>
- 3.11 In the Private Lives study, gay, lesbian and bisexual people living in rural/remote areas were more likely than those in metropolitan areas to report feeling depressed on more

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<sup>15</sup> See Ministerial Advisory Committee on Gay and Lesbian Health, 'What's the difference?': health issues of major concern to gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians Melbourne: Department of Human Services, 2002 (available at [www.health.vic.gov.au/glbtime](http://www.health.vic.gov.au/glbtime)).

<sup>16</sup> See above, n 14.

<sup>17</sup> Kline, J. (2006), *Discovering Lesbian Community? An Exploration of Lesbians' Experiences and Perceptions of Shared Community*. Unpublished PhD thesis, Department of Political Science, University of Melbourne: Melbourne.

Pitts, M., Smith, A., Mitchell, A., and Patel, S., (2006) *Private Lives - A report on the health and wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health and Society: Melbourne.

<sup>18</sup> Matrix Guild (Vic) Inc and Vintage Men Inc (2009) *Permission to Speak: Determining strategies towards the development of gay, lesbian, bisexual, transgender and intersex friendly aged care services in Victoria*, Matrix Guild (Vic) Inc and Vintage Men Inc: Melbourne, p 33.

than half the days in the past two years and were more likely to contemplate self-harm or feel they were 'better off dead'.<sup>19</sup>

### Stories of harm from the LGBTI community

3.12 The following stories are drawn from research conducted by the VGLRL and other sources:

#### **Stories from LGBTI people**

'One person took me to HR (Human Resources) claiming harassment because I had a photograph of my same sex partner on my desk.' (Leonard et. al., 2008 p.32 )

'Fucking dyke, keep away from me.' I come from a small town community and these are people I've grown up with.' (VGLRL, 2000, p. 33)

'Two guys came out of [the] flat and walk[ed] behind me and started calling me names, fag, poof...insinuating I wanted to "get fucked" and was a "slut" and that poofs and fags should be bashed. They followed me until I arrived at the venue and were threatening me the whole way.' (Leonard et. al., 2008, p.33)

'A speeding car with three men drove by and they all leaned out the window and started yelling homophobic abuse....The driver slammed on the brakes and turned around and pulled the car close to me and they all kept yelling abuse at me. I thought they were going to get out of the car and beat me.' (Leonard et. al., 2008 p.33)

'...After a while my friend told him that I was a lesbian and later on I went to the bathroom and he walked in after me and sexually assaulted me.' (Leonard et. al., 2008, p. 33)

3.13 These stories paint a vivid picture of the stigma, discrimination and harassment that dominates the lives of LGBTI people. They demonstrate the overwhelming need for effective legal protection against discrimination on the basis of sexual orientation and gender identity.

### The No To Homophobia campaign

3.14 The VGLRL is a key partner of the ground breaking 'No To Homophobia' campaign launched in August 2012. The campaign focuses on two television adverts and an on-line resource ([www.notohomophobia.com.au](http://www.notohomophobia.com.au)) designed to equip people to get informed, find support and take action to challenge homophobic, transphobic and biphobic harassment. The stories of harassment faced by LGBTI people elicited by this campaign and the positive

<sup>19</sup> Pitts, M., Smith, A., Mitchell, A., and Patel, S., (2006) *Private Lives - A report on the health and wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health and Society: Melbourne.

response to its launch within the broader community demonstrate both the need for protection and the support for such laws within general community.<sup>20</sup>

- 3.15 The following stories were contributed by members of Victoria's LGBTI community as part of the community engagement surrounding the campaign.

### **The 'No To Homophobia' Campaign: stories of transphobic harassment**

"I had been doing mechanical work for an organisation for about four years. I got along with everyone and everyone respected me because I was good at what I do.

"When I made my announcement to affirm my female gender and started that journey everything changed. Many of my colleagues wouldn't even look me in the face. They treated me with utter disrespect. All the funny looks, all the cold shoulders, being ostracised. It really is a crying shame because I still miss that job and I can never go back to it.

"My current workplace is different, extremely supportive. They just treat me like a normal person like everyone else, that's all I want. It makes such a difference, I don't hate getting out of bed in the morning anymore.

"My message to anyone who thinks their comments are harmless is that when you harass someone you're actually pushing them one step closer to suicide.

"I'm a strong person and I have people I love to support me and that's how I get through. Harassment does real harm to people and we all need to stand up and say no to transphobic harassment."

- Kate, Western Victoria

"I recently had an incident near my work when walking through the same industrial area I had walked through a hundred times before. It was 10am on a Monday morning. Two men started shouting homophobic comments at me while I ignored them.

"They kept it up and then came up and held me down and assaulted me. My clothes ripped and when they realised I was transgender the abuse became worse. I left that job and it has affected my personal relationships.

"I hate that this is part of our lives, that the constant fear of physical and emotional violence is always there, even when on the way to our jobs or in our day-to-day lives."

- Hunter, Oakleigh

<sup>20</sup> For a detailed list of positive media coverage and quotes of support from high profile community champions and organisations please see [www.notohomophobia.com.au/about](http://www.notohomophobia.com.au/about).

### **The ‘No To Homophobia Campaign’: Stories of homophobic harassment**

“I felt there was no real option but to leave my teaching job because of the harassment I was experiencing. I wasn’t able to live and work in a safe environment. When I left the principal wrote me a useless two line reference despite me spending nearly eight years as part of the school community.” - *Mark, Regional Victoria*

“I live a good life now, but want to share how hard it was on my mental health as a young adult. I felt forced to live in the closet for fear of abandonment by my family and society. I hated myself and thought I was an abomination.

“Last year I received a spam post on Facebook telling me to kill myself for being gay. I am so lucky it came to me as a 34 year old now I’m strong enough to stand it and not ten years ago. I am alive today because I overcame society’s fear and shame and decided that I was as valuable as anyone else.” - *Penelope, Preston*

“I was walking down the street with my girlfriend and a bunch of guys sitting outside a pub starting calling us dykes and making sexual comments. When you know that people might just harass you on the street for no good reason it’s impossible to relax and feel safe like other people can.”  
- *Michele, Cheltenham*

### **The ‘No To Homophobia’ Campaign: stories of biphobic harassment**

“At high school it was common to hear comments about poofters or gays and they were always negative.

“I didn’t know what I was at that age, but when you hear comments like that you quickly get the message that it isn’t good to be anything other than straight. It contributed to my sense of social isolation and low self-esteem.

“Since I came out to my friends and family as a bisexual man I’m able to live true to myself. I’m happier and now have a beautiful partner and son. I hope my old school has improved since I left because I wouldn’t want other young people to grow up in an environment like that.”

- *Daniel, Pakenham*

“Even though it was a tournament open to gay, lesbian, transgender, bisexual and queer skaters – My involvement was questioned because I have a male partner and a son.

“I felt humiliated being publically challenged about my sexual orientation in front of friends and team mates. I’ve also seen situations where transgender players receive similar harassment or are made to feel unwelcome because of their gender identity.

“It’s wrong and there’s no place for it in any sport. Given the harassment the queer community gets I would have thought people would know better than to do the same to those of us who are bi, queer or who don’t identify as gay or lesbian.”

- *Alison, Lilydale*

## 4. Protected attributes

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- 4.1 The VGLRL welcomes the Bill's inclusion of the new attributes of sexual orientation and gender identity, new to federal law but well-established in State and Territory anti-discrimination law. We note that coverage of these attributes was an election commitment of both the Federal Government and the Federal Opposition parties in 2010.

### Sexual orientation

- 4.2 We support the inclusion 'sexual orientation' as a new protected attribute and the definition of this term in the Bill. The inclusion of sexual orientation is a long awaited reform for Lesbian, Gay and Bisexual people and supported by the overwhelming majority of Australians.<sup>21</sup>

#### Sexual orientation vs sexuality

- 4.3 The VGLRL is firmly of the view that the terminology should remain 'sexual orientation', rather than 'sexuality' or 'sexual preference'. We respectfully disagree with the recommendation of the Discrimination Law Experts Group in this regard.
- 4.4 The term 'sexual orientation' reflects international and Australian best practice and is a practical, workable definition that will provide clarity for users of anti-discrimination legislation.
- 4.5 The term 'sexuality' is commonly understood to include matters relating to sexual orientation but also encompasses a range of other concepts much broader than sexual orientation. The term 'sexuality' is variously defined by dictionaries as 'sexual character', 'the physical fact of being male or female', 'one's capacity to experience and express sexual desires', 'recognition or emphasising sexual matters', and 'appearance distinctive of sex'.<sup>22</sup>
- 4.6 The term 'sexuality' is therefore not limited to the direction or target of an individual's sexual or emotional feelings. This latter concept is the defining feature of lesbians, gay and bisexual people and the root cause of the discrimination they suffer. In 2000, the Victorian Government introduced the term 'sexual orientation' into its equal opportunity

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<sup>21</sup> A galaxy survey conducted in 2009 noted that 85% of Australians supported the introduction of anti-discrimination protections on the grounds of sexual orientation and/or gender identity. See <http://www.coalitionforequality.org.au/GalaxyPoll-AntiDiscrimination.pdf>

<sup>22</sup> Various definitions found in the Macquarie Dictionary On-line (2012) and Oxford Dictionary (2<sup>nd</sup> Edition, 1989).



framework rather than using the term ‘sexuality’.<sup>23</sup> While not opposed to the inclusion of an additional attribute of ‘sexuality’ to cover these broader concepts, the VGLRL supports the use of the term ‘sexual orientation’ as a more accurate and appropriate method of achieving protection against discrimination for same sex attracted people.

Refinements to definition of ‘sexual orientation’

4.7 The VGLRL supports the existing definition of ‘sexual orientation’ but suggests minor refinements to ensure clarity and consistency with international human rights principles and the commitment made at the 2011 National Conference of the Australian Labor Party to align its policy with these international principles.<sup>24</sup>

4.8 First, the definition should refer to ‘emotional, affectional or sexual’ orientation. This broader terminology is more accurate and is consistent with international law, as expressed in the *Yogyakarta Principles*:

**Sexual orientation** is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with individuals of a different gender or the same gender or more than one gender.<sup>25</sup>

4.9 In this regard we support the clarification suggested by the Discrimination Law Experts Group, whether in the Bill or its Explanatory Notes, that ‘sexual orientation’ extends to behaviour and identity as well as feelings or attraction.

4.10 Second, the definition should use the expression ‘different sex’ rather than the binary term ‘opposite sex’. Neither sex nor gender are binary issues and nor is sexual attraction. The imposition of a sex binary therefore inappropriately and unnecessarily confines the definition.

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<sup>23</sup> Amendments were made in 2000 to the *Equal Opportunity Act 1995* (Vic), since replaced by the *Equal Opportunity Act 2010* (Vic).

<sup>24</sup> The VGLRL notes that the 2011 ALP National Conference adopted the commitment that ‘Australia will support the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*’ and ‘Labor recognises that the *Yogyakarta Principles ... provide a substantial guide to understanding Australia’s human rights obligations in relation to LGBTI Australians and their families.*’

<sup>25</sup> Yogyakarta Principles 6 (Introduction, footnotes 1 and 2) (available at <http://www.yogyakartaprinciples.org/>).

**Recommendation 7:**

The VGLRL recommends that the protected attribute ‘sexual orientation’ be retained, preferably with the following minor modifications to provide further clarity:

- specify that sexual orientation includes behaviour and identity as well as feeling or attraction;
- insert a reference to ‘emotional, affectional or sexual’ orientation; and
- replace references to ‘opposite sex’ with ‘different sex’.

**Relationship status**

- 4.11 The VGLRL strongly supports the proposed extension of the protected attribute of ‘marital status’ to ‘marital or relationship status’ to provide coverage for LGBTI de facto couples.
- 4.12 Under the current regime, as LGBTI people are unable to marry, or have their marriage from another jurisdiction recognised under Australian law, they have no protection from discrimination on the basis of their relationship status.
- 4.13 As outlined in the Explanatory Notes, the proposal to include protection on the basis of relationship status is consistent with the prohibition of sexual orientation discrimination in the Bill.

**Recommendation 2:**

The VGLRL recommends that the protected attribute ‘relationship status’ which is inclusive of same sex de facto couples be retained.

**Family responsibilities**

- 4.14 The VGLRL supports the proposed inclusion of the protected attribute of family responsibilities in relation to work and work-related areas.
- 4.15 The Bill defines ‘family responsibilities’ to mean the responsibilities of a person to care for any member of the person’s immediate family who is in need of care and support. ‘Immediate family’ is defined to include a de facto partner of the person, and a child, parent, grandparent or sibling of a de facto partner of the person.
- 4.16 The VGLRL is pleased to note that this definition will provide recognition and protection for people in LGBTI families, who may otherwise not be protected under a more narrow definition confined, by example, by reference to marriage. This protection will benefit the children and partners of LGBTI people. However, this definition should be refined further.

- 4.17 The VGLRL supports the recommendation of the Human Rights Law Centre that the attribute ‘family responsibilities’ should be extended to be described as ‘family and carer responsibilities’. The definition of ‘family and carer responsibilities’ should be clearly drafted to include domestic relationships and cultural understandings of family, including kinship groups, and members of the carer’s household.

### **Recommendation 3:**

The VGLRL recommends that the term ‘family responsibilities’ be changed to ‘family and caring responsibilities’ and defined to include all LGBTI domestic relationships and cultural understandings of family, including kinship groups, and members of the carer’s household.

## **Gender identity**

- 4.18 The VGLRL strongly supports the inclusion of ‘gender identity’ as a protected attribute in the Bill. However, the proposed definition could be improved in line best practice. Specifically, the definition of ‘gender identity’ proposed in the *Anti-Discrimination Amendment Bill 2012* (Tas) should be adopted, in keeping with the Government’s stated position that the Bill reflects the ‘highest current standards of State and Territory anti-discrimination law’.<sup>26</sup>
- 4.19 We recommend the Committee pay particular regard to the submissions of key organisations representing the sex and gender diverse community such as A Gender Agenda, Organisation Intersex International Australia and Transgender Victoria.

### **‘Identification on a genuine basis’**

- 4.20 The requirement that transgender people identify on a ‘genuine basis’ is highly problematic and should be removed from the Bill.
- 4.21 Discrimination law is appropriately focussed on capturing discriminatory conduct. For this reason, protected attributes should not be defined by reference to ‘testing’ the authenticity or legitimacy of a claim to possess a particular attribute. No other protected attribute definition in the Bill contains a ‘genuine basis’ requirement. The ‘genuine basis’ requirement stands in contrast to s 17(2) and s 19(4), which provide that discrimination is

<sup>26</sup> Explanatory Notes to HRAD Bill state that the definition of gender identity used in the Bill ‘matches the highest current standards in State and Territory anti-discrimination law’.

unlawful if it occurs because the attribute is assumed either generally or specifically in relation to a person, or in other circumstances such as a person being associated with an individual with a protected attribute.

- 4.22 Given the term ‘genuine basis’ appears to be inconsistent with the Bill’s inclusion of characteristics presumed to be associated with the protected attribute, the use of the term genuine basis may cause confusion in practice. A person with the characteristics of the definition of gender identity may still be covered, however the inclusion of the term ‘genuine basis’ may cause a lay person reading the definition to inaccurately assume they are not covered.
- 4.23 The term ‘genuine basis’ is not defined, which adds to the legal confusion and uncertainty surrounding this term.
- 4.24 The Bill adopts the ‘genuine basis’ wording because the phrase or similar terms have been utilised in State anti-discrimination laws. However, the recent proposed *Anti-Discrimination Amendment Bill 2012* (Tas) (the **Tasmanian Bill**) offers a much improved definition without this problematic and arguably offensive wording. The benefits of adopting the Tasmanian definition are discussed in further detail below.

#### *Inclusion of gender expression and mannerisms*

- 4.25 The definition of ‘gender identity’ should also be amended to include gender expression, such as mannerisms and appearance, in line with best practice. Currently the definition inappropriately focuses on ‘identification’.
- 4.26 Limiting the definition to ‘identification’ does not capture the full extent or nature of the discriminatory conduct often directed at transgender or other LGBTI people. Individuals are often discriminated against due to a perceived ‘discord’ between their gender presentation and perceived sex recorded at birth.
- 4.27 The relevance of this attribute is not limited to transgender and intersex people. Lesbians of masculine or androgynous appearance are often discriminated against due to their appearance (gender presentation or expression) rather than directly due to their attraction to women. For example, lesbians often report difficulties in accessing female toilets for this reason. Similarly, effeminate men can suffer unfavourable treatment including harassment and abuse due to their mannerisms and appearance.

#### *Further drafting deficiencies*

- 4.28 The ‘gender identity’ definition in the Bill also fails to account for legal change of sex by transgender people. A transgender person who has legally changed their sex is no longer ‘of that sex’. That individual is already legally recognised as a member of ‘the other sex’. The current drafting has potential to cause confusion when read in conjunction with State and Territory sex reassignment laws and can be easily redrafted to avoid this problem.

- 4.29 The current drafting also undermines the spirit and intent of laws and policies designed to facilitate legal recognition of change of sex. This sends a negative and harmful message to transgender people that despite undergoing the onerous process of achieving legal recognition of their affirmed sex they will nevertheless continue to be defined by reference to their sex recorded at birth.

*A preferred approach: Tasmania*

- 4.30 The deficiencies identified above can be easily avoided through the adoption of a recent definition not available to the Attorney-General's Department at the time of drafting the Bill.
- 4.31 The *Anti-Discrimination Amendment Bill 2012* (Tas) (**Tasmanian Bill**) was introduced to the Tasmanian parliament in September 2012 and has passed its lower house. The Tasmanian Bill is due to be debated in the upper house in early 2013. 'Gender identity' is defined as follows:
- Gender Identity** means the gender-related identity, appearance or mannerisms or other gender related characteristics of an individual (whether by way of a medical intervention or not), with or without regard to the individual's designated sex at birth.
- 4.32 This definition reflects best practice. Similar definitions exist in foreign jurisdictions. For example, the New York City Human Rights Law was amended in 2002 and captures appearance, behaviour and expression.<sup>27</sup>
- 4.33 The VGLRL supports the Tasmanian definition of gender identity because it offers simpler and more concise drafting that is clearer to understand for both potential complainants and those seeking to comply with the law.
- 4.34 Importantly, the definition more accurately and appropriately captures the discrimination that the law aims to redress by including gender appearance and mannerisms.
- 4.35 The removal of the 'genuine' alleviates the confusion and unnecessary regulatory burden created by this term and also reduces the risk of offence or disrespect to sex and gender diverse people.

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<sup>27</sup> The New York City Human Rights law prohibits discrimination on the basis of gender and defines gender as

..actual or perceived sex and...also...a person's gender identity, self image, appearance, behaviour or expression, whether or not that gender identity, self-image, appearance, behaviour or expression is different from that traditionally associated with the legal sex assigned to that person at birth.

Subdivision 23, Section 8-102 of Chapter One of Title Eight of the *Administrative Code of the City of New York* (Added by amendment 30<sup>th</sup> April 2002).

- 4.36 The removal of the words ‘a person of one sex’ alleviates the confusion and offence caused by using these terms and thereby undermining the regimes which recognise legal change of sex.
- 4.37 We note for the Committee’s benefit that the VGLRL’s view is that the proposed alternative definition from the Tasmanian Bill is consistent with the Consolidation Project’s purpose of reducing burden on business. Further, the definition provides greater clarity of protection while remaining within the confines of the stated intentions of the gender identity definition within the Bill’s Explanatory Notes.
- 4.38 We also note that transgender people may be subject to sexual violence and for completeness should be included under the circumstances involving sexual harassment listed in s 49(2)(a) .

#### **Recommendation 4:**

The VGLRL recommends that the Bill:

- a. adopt the definition of ‘gender identity’ in the Tasmanian Bill, that does not rely upon a ‘genuine basis’ test and is broadly inclusive of ‘gender expression’; and
- b. include ‘gender identity’ under the circumstances involving sexual harassment listed at s 49(2)(a).

## **Intersex**

- 4.39 Intersex people are partially protected in the draft Bill under Part B of the ‘gender identity’ definition. The Bill fails to correctly characterise and intersex people and the discrimination they experience due to their status as intersex persons.
- 4.40 A new attribute of ‘intersex’ should be inserted into the Bill, consistent with the approach taken in Tasmania. This would be both more accurate and respectful of intersex people but clearer to understand for those seeking to comply with the law.
- 4.41 Intersex status is not a matter of identity, rather it is a matter of biological fact, where an individual may have hormones, chromosomes or sex organs that are either – not wholly male or female; both male or female or neither. Defining intersex persons by reference to identity is, therefore, highly problematic.
- 4.42 The Tasmanian Bill protects intersex people against discrimination and contains a definition of intersex as follows:

**Intersex** means the status of having physical, formal or genetic features that are:

- (i) neither wholly female or male; or

- (ii) a combination of female and male; or
- (iii) neither male nor female.

This definition would provide greater redress and protection for intersex people in all areas of public life in Australia. The benefit of specifically addressing the needs and interests of intersex people must be considered in light of the isolation of many intersex people, and the consequent high rates of suicide prevalent within these population groups.<sup>28</sup>

4.43 Specific inclusion and protection for intersex people is consistent with existing Federal Government policy, such as the National LGBTI Ageing and Aged Care Strategy and mental health initiatives. State practice also reflects recognition of the specific needs of intersex people, particularly in the areas of health and, for example, prison populations.<sup>29</sup>

4.44 We note:

- a. the Government indicated the Exposure Draft would not include additional protections beyond those committed to at the election (being gender identity and sexual orientation); and
- b. the Consolidation Project's purpose of reducing the regulatory burden on business by providing clear, easy to understand definitions.

4.45 We submit that the introduction of intersex would be consistent with these two commitments as the inclusion of intersex within the gender identity provision does not meet item B's commitment of providing clarity for business.

4.46 We also note concerns raised with us that the inclusion of an intersex provision would amount to recognition of a third gender. We draw the Committee's attention to Australian Government's recognition of a sex category other than male or female by the provision of an 'X' option in Australian Passports. However, we would argue that the proposed Tasmanian definition does not equate to this type of recognition.

4.47 The protection of individuals on the basis of their physical differences within the proposed Tasmanian definition maintains the use of 'male' and 'female' categories of sex/gender, while providing protections for those whose appearances or biological indicators fall outside the spectrum of conventional understandings of male and female.

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<sup>28</sup> There is a lack of data on intersex people but overseas research and anecdotal evidence in Australia indicates that intersex adults have rates of suicidal tendencies and self-harming behaviour well above those of the general population. See Rosenstreich, G. (2011) *LGBTI People Mental Health and Suicide*. National LGBTI Health Alliance, Sydney), p.3.

<sup>29</sup> Both Victoria and ACT have developed policies to address the issue of intersex people in prisons. The treatment of intersex infants is a particular issue that has been the subject of research and specific policy development in Victoria, for example.

- 4.48 Having physical intersex differences is a biological fact no different to being left handed, blue eyed or of Asian appearance. It is necessary therefore that the Bill includes protections on this basis to ensure all Australians are not discriminated against because of their physical differences.
- 4.49 We support the submission of Organisation Intersex Internationale Australia (OI) and support inclusion of intersex as a separate attribute. We refer the Government to the OI submission for more detailed discussion on these issues.

#### **Recommendation 5:**

The VGLRL recommends that the Bill include protections from discrimination on the ground of intersex as a separate protected attribute, using the definition under the Tasmanian Bill.

### **Irrelevant Criminal Record / Lawful Sexual Activity**

- 4.50 The VGLRL is disappointed to that Irrelevant Criminal Record has not be included in the Bill. We find the limited explanation within the Explanatory Notes unconvincing.
- 4.51 We note that persons with a criminal record are regularly discriminated against, regardless of whether their record is very old and/or irrelevant.<sup>30</sup> The VGLRL supports the inclusion of the protected attribute of ‘irrelevant criminal record or criminal record’, for the benefit of those LGBTI people who suffer discrimination on the basis of criminal records.
- 4.52 In particular, we note for the Committee’s benefit that large numbers of gay men, in particular, will continue to carry the burden of a criminal record due to the draconian laws outlawing homosexual acts between men. These laws were repealed by states at various times between 1972 and 1997 but have left a legacy of stigma, discrimination and disadvantage.
- 4.53 Such records may continue to be noted by potential employers or community organisations conducting mandatory police checks before engaging these individuals in employment or volunteer opportunities. Criminal records for sex offences are a barrier to volunteering and employment in many jurisdictions and also limit overseas travel opportunities.<sup>31</sup>

<sup>30</sup> Fitzroy Legal Service and JobWatch, *Criminal Records in Victoria: Proposals for Reform*, 2005.

<sup>31</sup> For further discussion see Gerber, P, ‘Wiping the Slate Clean: Historic Convictions for Gay Sex Must Be Expunged’, *The Conversation*, 26 September 2012 (available at <http://theconversation.edu.au/wiping-the-slate-clean-historic-convictions-for-gay-sex-must-be-expunged-9768> ).



- 4.54 Alternatively, the specific concern of historical gay sex convictions may be able to be resolved by the inclusion of ‘lawful sexual activity’ as a protected attribute.<sup>32</sup> This attribute could be defined to include activity by reference to the current law, whether or not it was lawful at the time at in which it was engaged in.
- 4.55 The passage of the *Human Rights (Sexual Conduct) Act 1994* (Cth) made any laws which sought to arbitrarily abrogate the privacy of sexual conduct between consenting adults unlawful. This effect of this law was to overturn the provisions of the Tasmanian criminal code which, at that time, still made homosexual sexual activity a criminal offence.<sup>33</sup>
- 4.56 The Commonwealth Government should take steps to ensure that such historical convictions do not continue to haunt the lives of gay men.

#### **Recommendation 6:**

The VGLRL recommends the inclusion of ‘irrelevant criminal record’ as a protected attribute. In particular, the VGLRL recommends ensuring that LGBTI Australians formerly charged with laws prohibiting homosexual acts that would otherwise be lawful under current law are protected from discrimination. This could be achieved by the inclusion of the ‘irrelevant criminal record’ attribute’ or potentially the attribute of ‘lawful sexual activity’.

## **Family violence**

Family violence causes significant harm to men and women in the community, including LGBTI couples. In 2011 to 2012, there were 50,382 incidents of family violence reported to Victoria Police, representing a 23.4 per cent increase on the number of family violence incidents reported in the previous year.<sup>34</sup>

A 2008 study on same-sex partner abuse in Victoria found that the incidence of abuse within same sex relationships is similar to that reported in heterosexual relationships, with one in three LGBTI people reporting having experienced intimate partner violence in their lifetime (Leonard et al 2008).<sup>35</sup>

<sup>32</sup> This was discussed in the Australia Coalition for Equality’s Model Bill prepared for the 2009 National Human Rights Consultation.

<sup>33</sup> Australian Coalition for Equality, n 29 above.

<sup>34</sup> Victoria Police, *Crime Statistics 2011-2012*, p 7.

<sup>35</sup> Leonard, W., Mitchell, A., Patel, S., and Fox, C., (2008) *Coming Forward: The Underreporting of Heterosexist Violence and Same Sex Partner Abuse in Victoria*, Australian Research Centre for Sex Health and Society: Melbourne, p. 4.

People who are the victims of same sex partner abuse often face barriers in reporting and seeking assistance. The report by Leonard et al found that a large number of LGBTI people who experience domestic violence believe that reporting would lead to further abuse from service providers, or that their claims would not be taken seriously by mainstream police.<sup>36</sup>

The report by Leonard et al presents evidence that, while violence against LGBTI people has remained steady since the late 1990s, mainstream services, including services for intimate partner abuse, have not improved their access for safety and support services.

In addition, to partner abuse, LGBTI people may experience violence from family members on the basis of their sexual orientation.

Discrimination in employment, in accessing services, or in any area of public life, makes the lives of LGBTI people more difficult and will 'compound the already significant harm of the original acts of violence'.

Discrimination in the workplace against people experiencing family violence may also involve:

- (a) demotion or dismissal where the workplace performance of a person experiencing family violence declines without an obvious explanation; or
- (b) termination where a person is harassed by an abusive partner visiting the workplace, making threatening telephone calls or sending abusive emails.<sup>37</sup>

While the majority of research in this field has been undertaken in reference to domestic violence against women in heterosexual relationships, it should be assumed that LGBTI victims of domestic violence would suffer these similar negative impacts. Indeed, the individual's sexual orientation or gender identity may increase or compound the discrimination suffered, given the lack of awareness of this issue among the general community.

### **Recommendation 7:**

The VGLRL recommends that 'status as a victim of domestic violence' should be a protected attribute in section 17, which would offer protection to LGBTI people experiencing family violence.

<sup>36</sup> Leonard, W., Mitchell, A., Patel, S., and Fox, C., (2008) *Coming Forward: The Underreporting of Heterosexist Violence and Same Sex Partner Abuse in Victoria*, Australian Research Centre for Sex Health and Society: Melbourne, p 5.

<sup>37</sup> Associate Professor Andrea Durbach, 'Consolidating Australia's Anti-Discrimination Legislation', *Australian Domestic & Family Violence Clearinghouse Newsletter* (Spring 2012: 50), p 2.

## Characteristics extension

- 4.57 The VGLRL welcomes the extended meaning of having a protected attribute in s 19(4) of the Bill and definition of protected attributes in s 17(2).
- 4.58 These extensions are particularly important for the attributes of sexual orientation and gender identity. LGBTI people are often discriminated against because of perceptions, mistaken or otherwise, or because their appearance or mannerisms do not accord with some individuals' ideas regarding men and women and their respective gender roles.
- 4.59 These provisions also ensure that, for example, that children of same sex couples are protected against discrimination at school on the basis of their parents' sexual orientation.<sup>38</sup>

### Recommendation 8:

The VGLRL recommends that the extended meaning of having a protected attribute in s 19(4) and definition of protected attribute in 17(2) be maintained.

## Intersectionality

- 4.60 The VGLRL welcomes the inclusions of protections for intersectional discrimination in s 19 of the Bill. The ability of individuals to bring complaints regarding intersectional discrimination in the consolidated legislation without the need of a comparator is a significant step towards equality.
- 4.61 The structure of existing anti-discrimination laws in separate Acts fails to provide protections against intersectional discrimination. As a result, anti-discrimination laws are inaccessible to the most disadvantaged and marginalised members of our community, who experience complex forms of discrimination. Anti-discrimination law must be flexible enough to deal with how individuals experience compound forms of discrimination.
- 4.62 However, we note that s 22(3) of the Bill restricts coverage for certain protected attributes to work and work-related areas.
- 4.63 We are concerned that the s 22(3) exemption:
- creates unnecessary confusion and complexity about legal entitlements to be free from discrimination;

<sup>38</sup> See example discussed in section 7 below dealing with religious exemptions.

- creates a ‘hierarchy’ of discrimination without clear justifications for which protected attributes are included the exemption;
- undermines the purpose of the consolidation process to promote consistency across federal and state anti-discrimination laws;
- does not comply with Australia’s obligations to legislate to prevent discrimination on the exempted attributes under ratified International Labour Organisation conventions; and
- will continue to prevent people from making complaints about certain types of intersectional discrimination.

4.64 The VGLRL is concerned that limiting the scope of protections for certain protected attributes to work related areas will have a negative impact on members of the LGBTI community. Section 22(3) would prevent transgender people who experience discrimination in accessing accommodation on the basis of both their medical history and their gender identity from making a complaint on the way that both of these factored into the discrimination. If a same-sex attracted secondary school student experienced discrimination in a government-funded school because they were active in queer student politics, they would be protected from discrimination on the basis of their sexual orientation, but not on the intersection of their sexual orientation and political opinion.

4.65 Similarly, a bisexual parent would be protected from discrimination if they were denied access to social support services on the basis of their sexual orientation, but not the intersection of their sexual orientation and their family responsibilities.

4.66 The Bill should recognise that the effects of discrimination are compounded by the fact that discrimination may be experienced more frequently because it occurs on multiple and intersecting grounds.

#### **Recommendation 9:**

The VGLRL recommends that the scope of protections for all protected attributes in the Bill be extended to all areas of public life and the limitation for claims of intersectional discrimination in s 22(3) be removed.

## **5. Exceptions and exemptions**

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### **Religious exceptions**

5.1 The Bill allows religious organisations to discriminate against LGBTI people in all areas of public life, with the exception of aged care providers.

- 5.2 The VGLRL warmly welcomes the restriction for aged care service delivery but remains extremely disappointed that such broad permanent exceptions are proposed for religious organisations. These ‘permanent exceptions’ set religious groups apart from other groups, who need to justify that any differential treatment is fair and reasonable.
- 5.3 There is no explanation or justification offered for these provisions. The VGLRL looks forward to the Committee seeking to establish and verify the need for these religious exceptions through the collection of evidence from religious organisations and religious schools that enjoy the benefit of these provisions. As stated by the Human Rights Law Centre, on their face these exceptions are ‘manifestly inappropriate and inconsistent with Australia’s human rights obligations’.<sup>39</sup>
- 5.4 It is incongruous for the Government to take the positive step of introducing protections on the basis of sexual orientation and gender identity, yet entrench discrimination against these groups through broad permanent exceptions.

#### **Recommendation 10:**

The VGLRL recommends that the Committee thoroughly investigate the need for religious exceptions and provide in its report a detailed explanation of the needs for these permanent exceptions, including specific examples from religious providers as to how and where such exceptions are required.

#### Support for the need for a limitation in aged care

- 5.5 The draft Bill proposes to outlaw discrimination against LGBTI people when they are receiving federally funded aged care services. The government has indicated that decision was made to ensure this vulnerable group of people would not be discriminated against in ‘their home’.
- 5.6 The VGLRL welcomes the recognition that older LGBTI people should be recognised as a vulnerable population group with specific needs.<sup>40</sup> The position in the Bill is consistent with the growing body of evidence that stigma and discrimination on the basis of sexual orientation and gender identity are widespread within community and residential aged care, resulting in unmet needs of LGBTI seniors.<sup>41</sup>

<sup>39</sup> Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012, p 46.

<sup>40</sup> For example, in the recent National LGBTI Ageing and Aged Care Strategy.

<sup>41</sup> (GRAI) GLBTI Retirement Association Inc (2010) *We don’t have any of those people here: Retirement accommodation and aged care issues for non-heterosexual population* GRAI: WA at <http://grai.org.au/>; Matrix Guild (Vic) Inc and Vintage Men Inc (2009) *Permission to Speak: Determining strategies towards the development of gay, lesbian, bisexual, transgender and intersex friendly aged care services in*

- 5.7 Older LGBTI people with a lived experience of stigma and harassment often have to closet themselves when seeking residential care for fear of further discrimination.<sup>42</sup>
- 5.8 A common reaction, in some aged care facilities, when sexual expression occurred 'was often a response aimed at eradication':
- Geriatricians are not good at acknowledging sexuality. There is increased awareness when there are issues but it is addressed from a medical rather than psycho-social perspective. Some geriatricians are positive about sexuality; others struggle and are homophobic ('Aviva', geriatrician, hospital/community care and education).<sup>43</sup>
- 5.9 In the Matrix Guild research, staff would not touch a gay resident because he had HIV/AIDS, nor help a transgender person to cross-dress.<sup>44</sup> It is essential, therefore, for the health and wellbeing of this group, that this discrimination be addressed.
- 5.10 In working to achieve compliance with the provisions of the Bill, religious organisations will be encouraged to educate their workforce and address the cultural attitudes and lack of understanding evidenced above.
- 5.11 We note and commend the Federal Government on the recent launch of a National LGBTI Ageing and Aged Care Strategy. During the latter half of 2012 a draft of this strategy was consulted upon around the country and the feedback provided was that the issue of religious exemptions was raised at most of these consultations as an issue of key concern for older LGBTI people. In particular in rural areas and areas with high occupancy and or low service availability resulting in the lack of choice available to select a non-religious provider.<sup>45</sup>

Potential loopholes within aged care limitation

- 5.12 The proposed drafting of the limitation on discrimination in aged care by religious organisation presents possible loopholes to the stated policy intention.

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Victoria, Matrix Guild (Vic) Inc and Vintage Men Inc: Melbourne; Matrix Guild (Vic) Inc and Vintage Men Inc (2008) *My People: A Project Exploring the Experience of Gay, Lesbian, Bisexual, transgender and Intersex Seniors in Aged-Care Services*, Matrix Guild (Vic) Inc: Melbourne; Harrison, J., (2004) *Towards the Recognition of GLBTI Aged Care in Australian Gerontology*, Unpublished Health Sciences PhD thesis, University of South Australia: Adelaide; Hughes, M., (2004) *Privacy, Sexual Identity and Aged Care*, *Australian Journal of Social Issues*, 39(4):381-392.

<sup>42</sup> Above, n 10, p. 43.

<sup>43</sup> Matrix Guild (Vic) Inc and Vintage Men Inc (2009) *Permission to Speak: Determining strategies towards the development of gay, lesbian, bisexual, transgender and intersex friendly aged care services in Victoria*, Matrix Guild (Vic) Inc and Vintage Men Inc: Melbourne, p 38.

<sup>44</sup> Above, n 41.

<sup>45</sup> Private communication with Corey Irlam, Convener of the Ageing and Aged Care Working Group of the National LGBTI Health Alliance.

*Specific reference to HACC program*

- 5.13 The definition of ‘Commonwealth Funded Aged Care’ contained within s 6 of the Bill does not specifically refer to the Commonwealth Home and Community Care (HACC) program. We note that due to the recent inclusion of HACC within Commonwealth policy responsibility that its funding does not currently occur under any of the listed components of the definition.
- 5.14 As one of the largest components of Aged Care services, the specific inclusion of this scheme and its successor, the Home Support scheme, is essential, rather than relying upon ministerial proclamations through regulations.

*Domestic duties exception*

- 5.15 Aged care services include the provision of domestic care in a person’s home (cleaning, ironing, light gardening duties etc). These domestic duties may be provided through an in Home Care package or by a HACC service provider.
- 5.16 We note however that the aged care limitation is drafted to only apply to s 33 for religious providers. However, it is unclear whether the ‘domestic duties’ exception in s 43 will present an alternative avenue to exempt aged care service providers from the requirements of the Act.

*Clubs and member-based associations*

- 5.17 Similarly, s 34 provides permanent exceptions for club or member-based association. There is a lack of information in the public domain to determine whether some religious aged care providers would be able to access this exemption, effectively overriding the aged care limitation contained within s 33(3).
- 5.18 Further explanation and clarification of the potential operation and effect of this clause upon aged care services is necessary.

*Regulations made by the Minister*

- 5.19 Finally, we suggest the Committee should consider the hypothetical scenario by which the Minister for Ageing may provide regulations that are inconsistent with this policy intent, but subject to the exception contained within s 26 (disallowable instruments) or s 30 (exception for regulations).
- 5.20 Section 33(3), being the limitation on religious exceptions for aged care providers, should be removed from s 33(3) and applied across the entirety of Division 4 to ensure such loopholes do not occur. A drafting note may be considered at the current location of s 33(3) to redirect the reader to the limitation should it be felt necessary to reduce burden on business.

**Recommendation 11:**

The VGLRL supports the limitation on permanent exceptions for aged care providers including religious organisations. We respectfully recommend that the Committee specifically state its support for the provisions contained within s 33(3). Further, we recommend the following amendments to ensure consistent application of the limitation across the Bill:

- a. that the aged care limitation in s33(3) be applied across the entirety of division 4 to cover all exemptions/exceptions; in particular:
  - i. s 43 (domestic duties);
  - ii. s 34 (club or member based associations) and
  - iii. s 30 (regulations)
- b. that the definition of ‘Commonwealth-Funded Aged Care’ be updated to specifically include reference to the Commonwealth HACC / Home Support program.

*VGLRL’s principled position is to remove the religious exceptions*

- 5.21 The VGLRL’s principled position is that s 33 of the Bill should be removed and the general defence of justification (s 23) and inherent requirements exception (s 24) will be available to religious organisations and schools to enable them to engage in unjustifiable discrimination on the basis religious beliefs. These provisions would, for example, most likely permit discrimination in circumstances specifically enumerated in s 32 such as the ordination of priests.<sup>46</sup>
- 5.22 However, the VGLRL recommends a number of alternatives for consideration by the Committee. These options could be adopted in whole or part by the Committee.
- 5.23 We also note that the proposed provisions for religious exemptions would ‘lower the bar’ in some states, notably Tasmania where no religious exemptions exist and in Queensland where a limited exemption is available for inherent requirements of a particular job. We are deeply concerned that LGBTI people living in these states may face increased discrimination as a result of the Commonwealth reforms.
- 5.24 Before the alternative proposals are outlined, we first detail a number of important issues for consideration when considering policy formulation in this area.

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<sup>46</sup> Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012, p 47.



Choice is not always an option

- 5.25 One policy justification for the religious exceptions may be premised on the ability of individuals to choose from available services, including both religious and non-religious providers. However, the luxury of choice is simply not available in many areas and in many settings.
- 5.26 LGBTI people living in regional, remote or rural areas may have access to limited service delivery options. For example, specialist services such as Cancer treatment may only be available from faith based hospitals in particular geographical areas.
- 5.27 Vulnerable people accessing crisis, emergency or other vital social services do not often find themselves with a field of potential providers to choose from. Often the market for these services is extremely scarce and those individuals accessing services are extremely vulnerable. It is grossly inappropriate for individuals experiencing mental illness or those with an intellectual or other disability to be subjected to the prospect of discrimination on the basis of their sexual orientation or gender identity.

**Case Study: employment services**

David\* was a young university graduate in receipt of Newstart allowance. He had grown up in a Baptist family and following negative experiences relating to his sexual orientation he now feels uncomfortable in this type of religious settings.

David was referred by Centrelink to an employment service run by a Christian organisation with similar beliefs to the Baptist church. He did not feel comfortable utilising this service given his negative experiences relating to his upbringing. He spoke of his discomfort with the Centrelink officer and was told that he had no choice

David was young and not very confident so he was not open about his life and circumstances with the Christian service provider because he feared discrimination. This inhibition meant that David didn't receive the help that he needed.

*\*David's name has been changed to protect his privacy.*

Faith base service providers do not necessarily want to discriminate – do they?

- 5.28 The VGLRL recognises that many religious organisations do not discriminate in practice and a number have publicly stated their intention not to take advantage of the broad exceptions available under anti-discrimination law. Indeed, some religious

organisations present the existence of exemptions, seeing the exclusion of one particular group as inconsistent with their faith.<sup>47</sup>

- 5.29 Unfortunately the fear and apprehension of discrimination due to historical experiences is very real in the minds of LGBTI people, regardless of whether the provider in question intends to discriminate or not. Removing the ability of religious organisations to discriminate against LGBTI people as of right (that is, without justification) will go some way to increase the comfort levels of LGBTI people in dealing with religious service providers.

#### **Case Study: Crisis assistance for young people\***

Lee was a young university student who had just come out to his family and was kicked out of home. He approached Centrelink and was referred to the Salvation Army for assistance. The problem was that Lee was from a Salvation Army family and the Salvation Army religious beliefs were the reason he was asked to leave home and the church. He was too embarrassed to tell anyone at Centrelink and was unaware that there were other options available to him.

*\* Lee's name has been changed to protect his privacy.*

#### Proposal 1: Limiting discrimination in publicly funded service delivery, particularly to vulnerable groups

- 5.30 It is particularly objectionable that public funding be provided to organisations that are given broad licence to discriminate against LGBTI people and other vulnerable groups.
- 5.31 If the religious exceptions are to be maintained, they should be restricted to prevent any organisations in receipt of government funding from relying on the exceptions. This would ensure that public funding is not utilised to perpetuate discrimination and disadvantage. It is particularly offensive for LGBTI taxpayers to find themselves faced with public service delivery options that they may be unable to access or that may be delivered in a manner inappropriate for their needs.
- 5.32 The VGLRL warmly welcomes the provision that prevents discrimination in aged care by religious organisations. These provisions are discussed further below. However, if the Government sees fit to recognise the particular vulnerability of LGBTI people in one

<sup>47</sup> See, for example, public statements made by the Salvation Army in response to criticisms regarding their policy on homosexuality. See Siobhan Duck, 'Angry Response to Salvation Army's Gay Stance', *The Herald Sun*, 18 June 2012 (accessed at <http://www.heraldsun.com.au/news/victoria/angry-response-to-salvation-armys-gay-stance/story-fn7x8me2-1226398031984>). The VGLRL otherwise directs the Committee to submissions received from faith based service providers in the course of its inquiry.

service delivery setting, we fail to understand why other vulnerable groups should not attract similar protections. Further, if the justification for the aged care limitation is that care is provided ‘in the home’ or in comparable circumstances, the Committee should consider that disability services are often provided in identical settings.

- 5.33 LGBTI children in schools, or users of welfare agencies, or homeless people, or people in insecure housing, or agencies for people with disabilities are no less vulnerable, or subject to discrimination, than seniors in aged care.
- 5.34 The arbitrary nature of the proposed policy position is demonstrated by the following example. Under the Bill’s current provisions, a person with a disability receiving in-home care would be able to be discriminated against by a faith based service provider. However, once they turn 65 years of age the same person receiving the same service would be protected from discrimination. The service would not change and yet the legal protections against discrimination available to that person would shift markedly.
- 5.35 The aged care limitation is demonstrably arbitrary and should be extended to other areas including:
- mental health services;
  - homelessness and housing services;
  - disability services;
  - health services;
  - youth services;
  - schools; and/or
  - social, community and welfare services.
- 5.36 These settings deal with minors and potentially other people lacking legal capacity due to mental illness or intellectual disability, further evidencing their vulnerability. Considering the adverse mental and physical health impacts of discrimination, the Federal Government has a particular moral duty to ensure the delivery of these services is regulated so as to prevent or limit discrimination.

### Case Study: the vulnerability of a young lesbian in school

'I got "outed" when I was in Year Twelve and the whole school knew I was gay...and in classes people would make comments, throw stuff at me. The teachers wouldn't do anything. I had one teacher actually join in. So that was disgusting...I had my head slammed into locker doors. I had my school bus...people yelling out comments non-stop, just generally: "It's disgusting!", "You fucking lesbian!", "Fucking dyke!" And generally it'd be in big groups. 'Cause I was known for beating up school bullies at my school, so no one would take me on one-on-one.

My sister, little sister, went to the same school and she was picked on...So she was bullied right the way through her schooling, of course. And none of the teachers, apart from the psychology one, actually actively took steps to stop it. The Vice-Principal was gay but he, he could not tell anyone. And I remember, like, he pulled me into his office after I finished and told me that he wished he could have done more, but he would have lost his job. And that his partner died while he was teaching there and he wasn't able to tell anyone.

I was sent to a school counsellor to try and work out why I was gay and to stop me being gay. And my parents were called to tell them that I was gay'

*(Unpublished interview with a young Victorian lesbian).*

### Proposal 2: Limit publicly funded employment discrimination, including aged care workers

- 5.37 Many LGBTI people live with the threat or reality of discrimination in employment. The draft Bill allows religious organisations to discriminate against LGBTI job applicants and employees, regardless of whether the person can meet the inherent requirements of the job. Homophobic harassment is known to be prevalent generally in workplaces. As stated above, the Bill already provides sufficient safeguards to allow employers, including religious organisations, to discriminate when it is necessary and reasonable. For example, if the inherent requirements of a role require a particular religious education or view then an employer is able to justify discrimination on that basis.
- 5.38 If the permanent exceptions for religious organisations are to remain, the Bill should be amended to prohibit discrimination in employment by religious organisations in receipt of government funding. This prohibition should also extend to aged care, where discrimination in service delivery is already prohibited.
- 5.39 It is important that aged care residents, for example, feel comfortable and safe in order to disclose their sexual orientation or gender identity, and receive appropriate care. Creating a culture of diversity in a workplace begins with employees who share the values of diversity, including respect and understanding of LGBTI people. It is difficult to understand how an aged care facility would be able to create an environment free from homophobia and celebratory of diversity when employees are subject to discriminatory policies and practices.

### Case Study: employment by a religious organisation

Kathy is a teacher in a Catholic school and identifies as a lesbian. However, Kathy lives in fear that her sexual orientation will be discovered by her employer because she is aware that the Catholic church does not accept homosexuality and understand there is a policy in place to only employ teachers who subscribe to certain values. Kathy does not talk about her personal life with her colleagues or students and avoids social settings which are known to be frequented by same sex attracted patrons. Kathy had heard of lesbian teachers being discovered holding hands with other women on the street and being sacked.

Kathy's relationships have broken down in the past because her partners do not accept her closeted lifestyle and wish to be able to hold hands in public.

Kathy felt very lucky to secure a teaching role at the school given the difficult employment market for teachers and the long waiting list for jobs in the public school system. She intends to continue to sacrifice her personal life in favour of employment.

*\*Kathy's name has been changed to protect her privacy.*

### Proposal 3: Requiring notice of discrimination

- 5.40 If religious organisations are to be granted permanent exceptions from discrimination laws, members of the community are entitled to be informed of risk of discrimination before they make a decision to purchase goods and services or apply for a job. Imposing such a notice requirement would also enable those organisations that do not discriminate to be free from any suspicion of discriminatory conduct or intent.
- 5.41 The draft Bill should include a requirement that religious organisations publish statements on their websites, position descriptions for job advertisements and brochures or other promotional or informational material relating to the provision of goods or services, education or accommodation.
- 5.42 Religious organisations should also be required to register a notice of their intention to discriminate with the Australian Human Rights Commission (**Commission**) and a searchable public record should be maintained of these notices. This would not only serve to forewarn potential victims of discrimination but ensure accountability to the wider community.

### Proposal 4: narrowing the scope to 'religious doctrines and beliefs':

- 5.43 In addition to discriminatory conduct that conforms to the doctrines, tenets or beliefs of that religion, religious organisations are permitted to discriminate where it is 'necessary to avoid injury to the religious sensitivities of adherents of that religion'. There is no

justification for the broadness of this wording, which preferences religious freedom (indeed, ‘sensitivities’) over all other rights and interests such as the right to equality.

- 5.44 This clause must either be clearly and explicitly defined, for the purposes of the legislation, or removed altogether.

### **Recommendation 12:**

The VGLRL recommends that the religious exceptions are removed in favour of reliance on the defence of justification.

In the alternative, the VGLRL recommends that:

- (a) all religious organisations in receipt of government funding be restricted from discriminating in the delivery of goods and services;
- (b) all religious organisations in receipt of government funding, including those operating in the aged care sector, be prevented from discriminating against employees;
- (c) religious organisations intending to rely on the exceptions be required to publish a notice on their websites and in literature provided to potential applicants/customers/patients/students or others potentially affected by their intended discrimination and register a notice with the Commission; and/or
- (d) sub-sections 33(2)(b)(ii) and 33(4)(c)(ii) (injury to religious sensitivities) be removed or clearly defined.

## **Clubs and associations**

- 5.45 The VGLRL supports the exceptions for clubs and member-based associations contained in s 35(1) and s 35(2) of the Bill, notwithstanding recommendation 11 above.
- 5.46 Preservation of the social and cultural identity of a disadvantaged community groups is an important consideration in the development of anti-discrimination law. Attribute based clubs and member-based associations play an important role in promoting substantive equality for the LGBTI community.
- 5.47 However, the VGLRL prefers the model Work Health and Safety Act (WHS) Act definition of club to the proposal in the Bill. The current proposed definition refers to ‘providing and maintaining facilities, in whole or in part, from the funds of the organisation’. This wording is confusing and of uncertain meaning.
- 5.48 For example, the VGLRL does not maintain a physical office space or premises but the association maintains an on-line presence (perhaps a type of internet ‘facility’) using the

funds of the organisation. It is unclear whether this proposed definition would apply to the VGLRL.

- 5.49 The definition contained in the model WHS Act appears to be clearer in meaning and commonsensical in effect and operation.<sup>48</sup>

### **Recommendation 13:**

The VGLRL recommends that the exception for attribute based clubs in the Bill be retained but the definition of 'volunteer associations' from the model WHS Act should be applied to remove such organisations from the operation of the Bill.

## **Superannuation**

- 5.50 The VGLRL has concerns regarding the superannuation exception in the Bill.
- 5.51 Subsection (3) of s 39 provides that discrimination in superannuation may be permitted in relation to the terms and conditions of offer or the refusal to offer membership of a fund or scheme on the basis of, amongst other attributes, marital or relationship status.
- 5.52 The risk of such a provision is that it may act as an informal proxy for discrimination on the basis of sexual orientation.
- 5.53 For example, a superannuation fund may implement a practice of offering certain terms and conditions to a spouse of a member of the fund but not to a member who is in a de facto relationship. It is important to note that use of the term 'spouse' by a superannuation fund terms may, under superannuation legislation automatically includes different sex couples in a de facto relationship and excludes same sex de facto couples. Given that same-sex marriage is not currently permitted under law, this practice may disproportionately affect gays and lesbians in de facto relationships and is against the Australian Governments policy intention that superannuation funds would provide non-discriminatory practices between same sex and different sex de facto relationships.
- 5.54 The VGLRL suggests that further clarification be sought for the basis for such an exception and proposes that the provision be amended to clarify that individuals in de facto relationships cannot be treated less favourably than those in married relationships.

<sup>48</sup> The model WHS Act defines that a 'volunteer association' is a group of volunteers working together for one or more community purposes where none of the volunteers (jointly or alone) employs any person to carry out work.

**Recommendation 14**

The VGLRL recommends that s 39(3) be amended to clarify that individuals in de facto relationships cannot be treated less favourably than married individuals.

**Regulations**

5.55 The VGLRL is concerned that sexual orientation, gender identity and all other protected attributes other than race or sex are subject to the exception under s 30 ‘conduct in accordance with laws prescribed for by regulation’.

5.56 Such a broad exception appears to be carried over from previous standalone acts. This provision fails to provide sufficient accountability to the Australian Parliament and, ultimately, the Australian people. The sheer volume of regulations made by the Federal Government are not able to be subject to sufficient scrutiny by civil society. Such an exception is open to unintended misuse by successive governments and their Ministers.

The VGLRL submits that such a provision is unnecessary and should be removed from the Bill. Any regulatory exemptions should be required to be processed by disallowable instruments and/or legislation. We note that an alternative option available to Government would be to apply for it to apply for a temporary exemption from the operation of the Act.

**Recommendation 15**

The VGLRL recommends that s 30 (exception for regulations) be amended and that Government be required to rely therefore on s 26 (laws or disallowable instruments exception) or temporary exemptions granted by the Commission.

**6. Measures to promote substantive equality**

6.1 A core aim of anti-discrimination law is to promote substantive equality for historically disadvantaged and marginalised population groups. The discrimination and disadvantage experienced by LGBTI people has been recognised and documented by the Australian Government in recent reports such as the ‘National Human Rights Action Plan: Baseline



Study'.<sup>49</sup> Measures aimed at redressing the disadvantage suffered by LGBTI people are essential if substantive equality is to be achieved for these population groups.

## Special measures

- 6.2 The VGLRL welcomes the inclusion of the Bill's special measures provisions to redress historical disadvantage and promote substantive equality for all disadvantaged community groups, including LGBTI people. However, the existing drafting of the special measures provisions raises two concerns.
- 6.3 First, the test of 'sole or dominant purpose' in s 21(2)(a) should be broadened in relation to the 'sexual orientation' and 'gender identity' attributes, consistent with the SDA, to ensure a more enabling approach to the adoption of special measures. The VGLRL is concerned that a 'sole or dominant purpose' test may inhibit the adoption of specific programmes and measures for the benefit of LGBTI people.
- 6.4 There may be arguments to be raised in support of a stricter test in relation to race.<sup>50</sup> The VGLRL does not seek to comment on particular attributes outside its expertise and mandate but simply states that the special measures provisions may be one area of the Bill where a difference of approach between attributes may be appropriate and justified.
- 6.5 This issue must also be considered in its specific context for LGBTI people, that is, the unfortunate shortage of specific programmes, policies and institutional architecture within Government dedicated to the needs and concerns particular to LGBTI people.<sup>51</sup> The admirable recent developments in the aged care and ageing sector are, unfortunately, the exception that proves the rule.<sup>52</sup> Similarly, specific private sector LGBTI diversity programmes are an emerging trend and should be encouraged rather subject to increased regulation.<sup>53</sup>
- 6.6 Both public and private sectors organisations should be empowered under the Bill to adopt specific programmes and measures to assist LGBTI people. Some measures may not meet the test of 'dominant' purpose. A more appropriately permissive test would be

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<sup>49</sup> Attorney-General's Department, *National Human Rights Action Plan: Baseline Study*, 2011, pp 93-97.

<sup>50</sup> Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012, pp 21-23.

<sup>51</sup> For example, there is no specific Ministerial portfolio or government department responsible for LGBTI issues at any level of Government within Australia.

<sup>52</sup> National LGBTI Aging and Aged Care Strategy, December 2012 (available at <http://www.health.gov.au/lgbtistrategy>).

<sup>53</sup> See, for example, the Pride in Diversity 'Workplace Equality Index' (available at <http://www.prideindiversity.com.au/awei/>).

to adopt the SDA wording of 'sole purpose or for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one'.<sup>54</sup>

- 6.7 Second, s 21(2) fails to include a requirement for consultation with or participation the affected group in the design and implementation of special measures. This is a significant omission that is inconsistent with international human rights law and the current provisions of the RDA.<sup>55</sup> It is critical that the notion of 'advancement' be considered from the perspective of the beneficiaries of the special measure.
- 6.8 Finally, the VGLRL notes that steps taken to ensure the realisation of the civil, political, economic, social and cultural rights of particular groups should be distinguished from temporary special measures.<sup>56</sup>

## Positive duties to promote equality

- 6.9 The VGLRL supports the inclusion of a positive duty to promote equality for LGBTI people and other disadvantaged groups.
- 6.10 Discrimination against LGBTI people is a systemic problem often caused by entrenched cultures or practices driven by homophobia, biphobia, transphobia and/or heterosexism. Systemic discrimination is most efficiently and effectively tackled through systemic responses that encourage the prevention of discrimination rather than merely responding to the 'symptom' of an individual complaint.
- 6.11 A positive duty on public and private sector organisations would encourage proactive behaviour and reduce the incidence of discrimination rather than the law merely responding to misconduct. Positive duties recognise and alleviate the burden that currently rests with victims to enforce the law against discriminators.
- 6.12 Introducing positive duties would work towards alleviating the poorer outcomes for LGBTI people discussed in section 1 above.

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<sup>54</sup> Section 7D(3), SDA.

<sup>55</sup> CERD, *General Recommendation No 32: The meaning and scope of special measures in the International Covenant*.

<sup>56</sup> See suggestion from the Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012 pp 23-24.

**Recommendation 16:**

The VGLRL recommends that the special measures provisions be amended as follows:

- 1) the test of 'sole or dominant purpose' in s 21(2)(a) should be broadened in relation to the sexual orientation and gender identity attributes, consistent with the SDA, to ensure a more enabling approach to the adoption of special measures; and
- 2) a requirement for participation by or consultation with affected groups should be included.

**Recommendation 17:**

The VGLRL recommends that the Bill be amended to include positive duties on public and private sector actors to promote equality and/or eliminate discrimination.

## 7. Commissioner for Sexual Orientation and Gender Identity

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- 7.1 Section 160 of the Bill provides the Commission consists of a President and seven Commissioners. Each of the current Special-Purpose Commissioners is preserved. However, there is no provision made for carriage of Sexual Orientation and Gender Identity issues by any of these members.
- 7.2 While the VGLRL acknowledges the resource and other constraints the Commission is operating within, this omission creates an unfortunate hierarchy of attributes and entrenches inequality between the attributes.
- 7.3 The Commission has a time honoured history of sharing portfolios. We think it only fair and appropriate that a LGBTI Commissioner be created.
- 7.4 Alternatively, if it is intended that portfolio responsibility rest with the President, the legislation should be amended to clearly provide for this allocation of responsibility. To do otherwise creates the risk that sexual orientation and gender identity (SOGI) issues may be de-prioritised by the Commission in the future, given the absence of a formal mandate.

**Recommendation 18:**

The VGLRL recommends that the Committee ensure ongoing representation of Sexual Orientation and Gender Identity (SOGI) issues by the Australian Human Rights Commission by either:

- a. appointing a Commissioner responsible for Sexual Orientation and Gender Identity (SOGI) discrimination and providing for such a role in s 160 of the Bill; or
- b. specifically state in legislation that SOGI issues will be the purview of the President or delegated to an alternative Commissioner.

## 8. The legal framework

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- 8.1 The general machinery of the Bill applicable to all protected attributes should effectively respond to discrimination including providing remedies to victims. Ideally, anti-discrimination law should address discrimination on a systemic level. While the Bill represents a much needed improvement and harmonisation of the current federal statutes, unfortunately only limited progress has been made in relation to mechanisms to address systemic discrimination and promote equality.
- 8.2 We support and endorse the recommendations made by the Human Rights Law Centre, the Discrimination Law Experts Group (but favour our recommendations in relation to the Sexual Orientation, Gender Identity and Intersex attributes) and the National Association of Community Legal Centres in this regard. These submissions provide more detailed feedback on the general legal machinery of the Bill.

## Definitions of discrimination

### Section 19(1)

- 8.3 The VGLRL supports the unified definition contained in the Bill and the removal of the comparator test. The existing definitions are overly complex and present a significant barrier to access to justice for victims of discrimination.<sup>57</sup>

### Section 19(2)(a) - harassment

- 8.4 The VGLRL strongly supports the explicit acknowledgement in clause 19(2)(a) of the Bill that harassment is a form of unfavourable treatment. The harmful effects of homophobic, biphobic and transphobic harassment are well documented. Indeed, the need to strengthen existing legal protections against harassment for LGBTI people has been recommended by expert LGBTI bodies in relation to State based anti-discrimination laws.<sup>58</sup> It is important that legal protections are available nationally to protect LGBTI people from this type of harassment consistently across Australia.
- 8.5 As discussed above, the VGLRL is a key partner in a Victorian based campaign entitled 'No to Homophobia' designed to raise awareness of the harm caused by homophobic, biphobic and transphobic harassment and to encourage those witnessing and experiencing harassment to respond to and report harassment.
- 8.6 Section 19(2)(a) will assist by clarifying the law and making it clear that harassment is a form of unlawful discrimination when connected to a protected attribute.

### Section 19(2)(b) - conduct that offends, insults or intimidates the other person

- 8.7 The proposed wording of s 19(2)(b) in the Bill attempts to provide further clarification of the types of conduct that may constitute unfavourable treatment and thereby fall within the definition of discrimination. This wording is similar to that provided by existing anti-discrimination law statutes and recommended by previous inquiries.<sup>59</sup> However, the use

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<sup>57</sup> See, for example, previous submissions made by the Discrimination Law Experts Group, the Human Rights Law Centre and the National Association of Community Legal Centres.

<sup>58</sup> Joint working group of the GLBTI Ministerial Advisory Committees for the Attorney-General and Minister for Health, *With Respect: A strategy for reducing homophobic harassment in Victoria*, 2006 (available at <http://www.notohomophobia.com.au/about>)

<sup>59</sup> *Sex Discrimination Act 1984* (Cth) (SDA), s 28A prohibits sexual harassment 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. See *With Respect*, note 4 above.

of the word ‘offend’, in particular, has given rise to a concern that it could be interpreted in a manner that gives it a broader application than was apparently intended.<sup>60</sup>

- 8.8 The VGLRL has had the opportunity to consider the proposed amendments to this clause recommended by the Human Rights Law Centre<sup>61</sup> and agrees that removing the word offence and replacing it with words drawn from existing international human rights law and s 9 of the *Racial Discrimination Act 1975* (Cth) (**RDA**) would be an appropriate solution.

## Shared burden of proof

- 8.9 The VGLRL supports the Bill’s proposal to introduce a shared burden of proof between the applicant and respondent in discrimination claims, where the burden of proof shifts to the respondent once the complainant has made a prima facie case of discrimination. We note that this proposal does not represent a ‘reversal’ of the onus of proof.
- 8.10 The shared evidentiary burden is a much fairer and common sense driven approach to evidence gathering. It simply requires the person who is in the best position to know why they engaged in particular conduct. The difficulties presented by the current approach have been well documented by previous submissions on the consolidation process and recommendations from previous Senate inquiries.<sup>62</sup>
- 8.11 The current tests lead to unjust outcomes. The shared burden provides an appropriate and sensible approach which reflects existing principles of civil law.<sup>63</sup>

## Each party bears their own costs

- 8.12 The VGLRL supports an anti-discrimination complaints system that reduces the current barriers to access to justice for those who experience discrimination. The technical complexities of the current law, inequities of the current evidentiary burden and risk of an

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<sup>60</sup> James Spigelman, ‘Where do we draw the line between hate speech and free speech?’ (Human Rights Oration, Sydney, 20 December 2012), (available at [www.humanrights.gov.au/about/media/hnews/2012/132\\_12.html](http://www.humanrights.gov.au/about/media/hnews/2012/132_12.html)).

<sup>61</sup> Human Rights Law Centre, *A Simpler, Fairer Law for All*, recommendation 3.

<sup>62</sup> See, for example, submissions made by the Discrimination Law Experts Group, the Human Rights Law Centre and the National Association of Legal Centres to the Attorney-General Department’s Discussion Paper on the Consolidation of Federal Anti-Discrimination Laws. Senate Standing Committee on Legal and Constitutional Affairs, *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting equality* (2008), [6.46-6.51].

<sup>63</sup> For further analysis see Human Rights Law Centre, *A Fairer, Simpler Law for All*, pp 13-17.

adverse costs award mean that many complainants simply do not proceed with otherwise genuine and legitimate claims of discrimination.<sup>64</sup>

- 8.13 The VGLRL supports the Bill's proposal that each party should bear their own costs. This is a positive departure from the current system where the loser pays the winner's costs. The risk of an adverse costs order is a significant disincentive for applicants considering commencing legal proceedings, regardless of the merit of their claim.
- 8.14 The following factors should be taken into account when developing a policy position on costs for the Bill:
- (a) historically low compensation awards for anti-discrimination cases;
  - (b) the reality that discrimination disproportionately affects people from a lower socio-economic backgrounds and, ordinarily, vulnerable and/or disadvantaged communities;
  - (c) the insufficiency of legal aid or other legal assistance for discrimination matters;
  - (d) the power imbalance that ordinarily exists between the respondent and applicant in discrimination matters; and
  - (e) the tax advantages available to respondents in relation to litigation costs that are not available to applicants.
- 8.15 When these factors are considered, the proposal that each party bear their own costs does not appear to adequately remedy the problem of access to justice for applicants. The VGLRL supports an additional provision that requires the Court to take into account factors such as those above, in addition to the public interest in the case, when making decisions regarding costs.

## Representative proceedings

- 8.16 The VGLRL is disappointed the Bill does not provide for representative complaints of discrimination. Enabling the Commission and/or other bodies to pursue representative complaints on behalf of disadvantaged classes of individuals would go some way to reducing the burden on individuals and achieve outcomes that have wider benefit and contribute to eliminating discrimination on a systemic basis. Enabling these types of complaints would be fairer, more efficient and more effective at reducing and preventing discrimination.
- 8.17 The stories of discrimination and harassment shared with the VGLRL throughout the No To Homophobia campaign (see above) and communications with our members throughout this consultation process overwhelmingly suggested that complainants often

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<sup>64</sup> See submissions made by National Association of Community Legal Centres to the Attorney-General's Department Discussion Paper on the Consolidation of Anti-Discrimination Laws.

feel ill equipped to pursue complaints due to the emotional strain and financial and other risk.

### **Case Study: Alex\***

Alex was studying at high school and working part time in the hospitality industry. Alex had been raised as a male and Alex's sex recorded at birth was male. However, in Alex's teens he began to question to his gender identity and eventually decided to begin the process of transitioning to become a woman.

Alex's friends didn't accept the new identity. Alex was teased and harassed at school. Alex's boss felt uncomfortable with Alex's situation and decided his customers would as well and terminated Alex's employment as a waiter.

The Victorian Gay & Lesbian Rights Lobby was contacted about Alex's situation and suggested that Alex seek advice from a lawyer about the termination, as well as emotional and psychological support and assistance.

However, Alex was going through such a significant and emotionally tumultuous time in her life that she didn't feel it was worthwhile pursuing any legal claim. It was simply too much to bear on top of everything else.

\*Alex's real name has not been used. This inquiry was received by the VGLRL in August 2012.

## **Volunteers**

- 8.18 The VGLRL supports the inclusion of volunteers under the definition of employment and their protection from discrimination in all areas of public life. We note the Bill, appropriately, does not regulate volunteer based activities in the private realm.
- 8.19 Volunteering provides individuals, including LGBTI individuals, with opportunities for community engagement and social interaction. Volunteering is also an important pathway to employment for many people, including, for example, people seeking to develop skills and experience in particular industries.



**Recommendation 19:**

The VGLRL recommends that the unified definition of discrimination , shared burden of proof and no costs jurisdiction should be retained.

**Recommendation 20:**

The VGLRL recommends that s 19(2)(b) should be amended in line with recommendation 3 of the Human Rights Law Centre submission.

**Recommendation 21:**

The VGLRL recommends that s 133 should be amended to require the Court to take into account factors such as the tax subsidies available to the respondent, the financial means of the parties, any other vulnerabilities of the parties and the public interest in the case.

**Recommendation 22:**

The Bill should be amended to make provision for representative complaints by the Commission and public interest organisations with a legitimate interest in a particular subject matter.

**Recommendation 23:**

The VGLRL recommends that the protection for volunteers contained in the Bill be retained.

*Sexuality, when fully allowed to unfold, has many aspects. It merges the sacred, the intimate, the sensual, the emotional, the creative, the funny, the tender and the intense...But also the inner harms - loss of trust, loss of the capacity for love, destruction of self-worth, death of spirit. We know, intuitively, and sometimes from bitter experience of our own, that if you hurt someone's sexuality you hurt their soul. When the soul begins to die, the body follows.*

Biddulph, S., (2009) How Girlhood was Trashed and What we can do to get it Back, in M. Tankard-Reist, (Ed) (2009) *Getting Real: Challenging the Sexualisation of Girls*, Spinifex Press: Melbourne..

[www.vglrl.org.au](http://www.vglrl.org.au)

Equality and social justice for the LGBTIcommunity

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